



POLICE DEPARTMENT

October 13, 2021

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In the Matter of the Charges and Specifications :

- against - :

Police Officer Douglas Gerber :

Tax Registry No. 957619 :

Highway District Collision Tech. Group :

Case No.

2018-18495

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:

Jeannie Elie-Fulgencio, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

Michael Martinez, Esq.
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To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer Douglas Gerber, on or about July 1, 2017, at approximately 0440 hours, while assigned to 023 PCT and on duty, in front of 1924 Second Avenue, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he gave an open container summons to Person A without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on September 16, 2021. Respondent, through his counsel, pleaded Not Guilty to the subject charge. The CCRB-APU presented the hearsay statements of Person A and Person B and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Not Guilty of the charged misconduct.

ANALYSIS

The following is a summary of the facts which are not in dispute.

On July 1, 2017, at approximately 0440 hours, Respondent and his partner, Police Officer Jorge Ortiz, were performing patrol duties in Sector BOY, 23rd Precinct. At about that time, they encountered Person A in front of 1924 Second Avenue, between East 99th and 100th Streets. Respondent had a discussion with Person A, which led to Respondent issuing him a summons for a violation of the "open container" ordinance.

At issue in this case is whether Respondent had sufficient legal authority to issue a summons to Person A.

The following is a summary of the relevant trial evidence.

Police Officer Jorge Ortiz testified that on July 1, 2017, at approximately 0440 hours, he was on duty and performing patrol duties with Respondent in Sector 23-BOY (T. 17-18). Ortiz recalled that Respondent was the operator and he was the recorder for that tour (T. 18-19). At about that time, Respondent told Ortiz that he had seen two men sitting down and that one of the men was holding an open container in his hand (T. 19). When Ortiz saw the two men, they were still seated on a railing surrounding a tree; he also saw the container but it was on the ground (T. 21-22). From his initial vantage point of approximately 30 feet away, Ortiz could not tell whether the container was open or what type of container it was (T. 20, 22).

Ortiz testified that Respondent stopped their vehicle and they both approached the two seated men; Ortiz later learned their names were Person A and Person B (T. 22-23). He did not recall seeing anyone else on the street but did recall seeing a convenience store near the corner (T. 23, 40). Ortiz and Respondent approached the men and stopped approximately ten feet from them; from that position, he saw a beer can on the ground positioned between Person B and Person A but closer to Person A's foot (T. 23-24, 26, 39).

Respondent asked Person A for identification but he hesitated providing it; Respondent told Johnson, "I can write you a summons or I can arrest you" (T. 25, 41). Person A then provided his identification and Respondent began drafting the summons (*Id.*). While Respondent was writing the summons, Person B remained seated and did not say anything; Person A, however, began shouting at Respondent, expressing his displeasure at receiving a summons (T. 25-26, 28, 46). Ortiz testified that at one point, Respondent had to tell Person A to "sit back down" (T. 47).

Once Respondent finished writing the summons, he gave it to Person A; Ortiz and Respondent then got back into their police vehicle and left the location (T. 30). Ortiz initially

testified that during this interaction, he did not see Person A pick up the beer can or drink from it; after having his recollection refreshed, he adopted an earlier statement he made in which he stated he “saw one guy holding the beer” (T. 29, 32-35). While he did not recall hearing Person A deny ownership of the beer, he did remember Person A saying, “It’s just a \$10 ticket; I’ll just pay it” (T. 30, 41).

Respondent testified that at about 0440 hours on July 1, 2017, he was traveling southbound on Second Avenue when he observed a man sitting with an open container of alcohol at his feet; the alcohol was in a can with the top “popped,” which was inside a paper bag with the top rolled down (T. 61). He and his partner, Police Officer Ortiz, stopped their vehicle and approached the man, whom they later learned was Person A. Respondent asked him for identification, which he attempted to show to Respondent without removing it from his wallet (T. 64). He then told Person A that he needed to see it so that he could issue him a summons for possessing an open container of alcohol (*Id.*). According to Respondent, Person A then said, “This isn’t my beer” (T. 65). Respondent reached into the bag and removed the beer; he testified that the can said “Pilsner” and “24 ounces”; he also testified that the can was “freezing cold” (*Id.*).

After asking Johnson for his identification four or five times, he eventually gave it to Respondent (T. 66). Respondent returned to his police vehicle to retrieve a blank summons and used his Department telephone to see whether Johnson had any open warrants (*Id.*). When the warrant check returned negative results, Respondent returned to Person A and began writing him a summons (T. 68).

According to Respondent, Ortiz told Person A, “It’s a cheap \$10 ticket; it’s going to be okay (T. 68-69). Respondent testified that Person A then said, “Well, it it’s a \$10 ticket . . .”

before picking up the can, taking a drink from it and putting it back down on the sidewalk (T. 69). Person A then stood up and took a step toward respondent; Respondent told Johnson, “Sir, you have to stop. Take a seat” (T. 70). Person A kept approaching him, so Respondent put out his hand and grabbed the front of Person A’s t-shirt, telling him again that he needed to sit down.” At that point, Person A fell to the ground, shouting “This is a lawsuit” (T. 70). He turned to Person B and said, “Go upstairs, get my mom. This is a lawsuit” (T. 71). Respondent continued writing the summons and, when it was completed, handed it to Person A before returning to his patrol car (*Id.*).

Person A was interviewed by CCRB investigators on July 17, 2017 (CCRB Ex. 1, 1A). In his statement, he asserted that at 0440 hours on July 1, 2017, he was sitting outside his building with a friend of his. At that time, two police officers stepped out of a police car and approached him. According to Person A they asked him, “Whose can is that?” referring to a can that approximately four feet away from him. When Person A denied that the can was his, one of the police officers asked him for identification. Person A claimed he told the police officer that he lived in the building, then gestured toward it with his hand, before removing his identification from his wallet and handing it to the officer. He overheard the police officer make a telephone call, during which he apparently ran a warrant check using the information on the identification, which yielded negative results (CCRB Ex. 1A at 3-4).

In his statement, Person A asserted that the police officer then began drafting a summons for violating the “open container” law. Person A claimed that when he stood up, the police officer asked him, “Who gave you permission to stand?” Person A replied, “Why do I need permission to stand if I’m not under arrest or if I’m not in any, any violations? I’m just standing up.” The

¹ Person A died prior to this trial.

police officer asked him again, in what Person A described as a very stern voice, “Who gave you permission to stand?” The police officer then stepped toward Johnson and reached for him; Person A took two steps backward and raised his hands in the air. According to Johnson, the police officer then grabbed his shirt and balled it in his fist, while Johnson asked him, “Why are you doing this?” Person A claimed that the police officer then pulled him toward him by the shirt, placed his right foot behind Person A’s left leg, and pushed him backward, causing both he and the police officer to fall over. Person A claimed that the police officer fell on his leg (*Id.* at 4-5).

Person A claimed that he asked his friend Person B to ring the doorbell for his family’s apartment so that they would come down to the street. As Person B went toward the building, the police officer handed Johnson, who claimed he was still on the ground, the summons; the officers then entered their vehicle and drove away. Person A asserted that he went home and went to bed. He claimed that when he woke up the next morning, his knee had swollen to the size of a softball. Person A claimed that he was unable to put any pressure on either his knee or his ankle. He sought medical treatment at Metropolitan Hospital, where he was informed that he had soft tissue damage but no broken bones² (*Id.* at 5-6).

Person A conceded in his statement that the area where he was sitting was very well-lit. He described the police officer who drove the police car as being 6’1” tall, 210 pounds with blond hair³. Person A described the second officer as 5’7”, 170 pounds with dark hair (*Id.* at 14-18).

² While Person A discussed bruising to his thigh during his interview, no photographs of any such injuries were offered in evidence.

³ I had the opportunity to observe Respondent’s physical appearance during the trial. Although he identified himself in his testimony as the operator that tour, and the height and weight provided by Person A appear to be consistent with my own observation, Respondent had brown hair.

Person B was interviewed by CCRB investigators on July 27, 2017 (CCRB Ex. 1, 2A). In his statement, he claimed that at 0440 hours on July 1, 2017, he and his friend Person A (referring to Person A) were “just chilling and hanging out.” Person B claimed that he and Johnson were seated on the railing of a gate by a tree when a police vehicle arrived at the location and stopped. Two police officers got out and approached both men. According to Person B the police officers saw a can of beer in a brown paper bag “a few feet away” from them but the can was closer to Person A. Person B stated that the can was leaning against the gate where the tree was. He denied that either of them had been drinking and asserted that “a lot of homeless people drink over there.” He claimed that he surmised that it contained alcohol because “Who [puts] a can of soda in a brown bag?” Person B speculated that the police officer asked Person A for identification because the can was closer to Person A than it was to him. When Person A handed the police officer his identification, the officer supposedly asked him for his first name; Person A replied that his first name was Person A, causing the police officer to ask, “What first name goes by Person A?” (CCRB Ex. 2A at 3-4, 10-11, 21, 25-26).

As Person B recounted the event, Person A stood up and the police officer “screamed at him, ‘Yo, sit down.’” The police officer then “tried to drag him, put his right leg behind his left leg and tripped him.” Person B added, “I think he landed face first. I think the cops tried to, I think he had his arm, yeah, he had his arm on the top of his head, slamming.” Person A then asked Person B to ring his family’s doorbell to have them come down to the street. According to Person B he went to do so but by the time he rang the doorbell, the police officers had already departed (*Id.* at 4-5).

Person B described the two police officers he encountered that morning as being 5’8”, 170 pounds with black hair and 5’6”, 160 pounds with black hair. He also claimed that the area

where he and Person A were sitting was not very well lit. He also claimed that Person A immediately provided his identification to the police officer when he was asked to do so.

Person B claimed that when the police officer explained to Person A that he would receive a \$150 fine for the beer container, Person A attempted to correct the police officer on the law, since he “had been locked up a couple of times.” According to Person B this exchange caused the police officer to become frustrated. Finally, Person B acknowledged seeing the police officer pour the contents of the can onto the ground. Once the liquid was poured out, Person B could tell that it was alcohol by its odor (*Id.* at 13-16, 24-25, 35-36).

I credit Police Officer Ortiz’s testimony as logical and forthright. His description of the events comports with common sense and the other credible evidence in the case. Similarly, I credit Respondent’s testimony for the same reasons. While Respondent is deemed an interested witness in this proceeding, his recitation of the pertinent details of his interaction with Person A was corroborated by Police Officer Ortiz.

In contrast, the hearsay statements of Person A and Person B were illogical, self-serving and inconsistent with each other in material respects. As set forth in more detail below, I find their statements unreliable.

In Person A’s statement, he alleged that when Respondent threw him to the ground, Respondent landed on top of him, causing bruising to Person A’s thigh. This assertion was not corroborated with any photographic evidence which may have been gathered during CCRB’s investigation of the incident. Person A also asserted that he sought treatment for this purported injury at Metropolitan Hospital but no medical records were offered to support this assertion. The absence of corroborating evidence makes it more likely than not that Person A’s claim of injury is not credible. It is unnecessary to establish the infliction of an injury to render the

issuance of a summons unlawful; that Person A chose to make this self-serving claim suggests that it was a deliberate attempt to embellish his account.

In Person B statement, he alleges that Respondent threw Person A to the ground face-down and exerted pressure upon his head, causing Person A's face to have contact with the pavement. Inasmuch as Person A never made this claim in his statement, this assertion appears to be an effort to embellish Person B statement in a misguided effort to aid his friend. Person B statement also includes a description of the two police officers he observed during the incident with Person A which raises a question as to his ability to recall the incident accurately. While the description he gave of the two officers he recalled observing (5'8", 170 pounds with black hair and 5'6", 160 pounds with black hair) may well have described Police Officer Ortiz, it was entirely inconsistent with Respondent's physical characteristics. As I previously noted, Respondent is five to six inches taller and 30-40 pounds heavier, than either of the officers Person B described.

Issuance of a Summons Without Sufficient Legal Authority

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondent issued Person A a summons without sufficient authority.

According to New York City Administrative Code Section 10-125,

No person shall drink or consume an alcoholic beverage, or possess, with intent to drink or consume, an open container containing an alcoholic beverage in any public place except at a block party, feast or similar function for which a permit has been obtained.

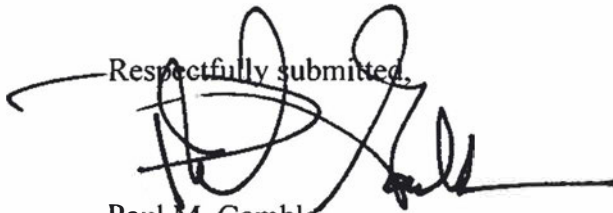
(N.Y.C. Admin. Code § 10-125(b)).

According to Respondent's credible testimony, he observed Person A and Person B sitting on a railing near a tree, in a well-lit area. Respondent also observed a can which was in a paper

bag, sitting on the ground near both men. He eventually examined the can, and found that it: (1) was open; (2) was cold to the touch; (3) had “Pilsner”⁴ on the label; and (4) had liquid inside it. There is no dispute that the location where Respondent encountered Person A was and is a public place.

Based upon those observations, he had reasonable cause to believe that the can contained beer, which would fall under N.Y.C. Administrative Code 10-125’s proscription of alcoholic beverages. As such, Respondent had sufficient legal authority to issue Person A a summons for violating this local ordinance. While it is true that the factual assertions in the respective testimonies of Respondent and Police Officer Ortiz may or may not be sufficient to establish Person A’s dominion and control of the beer to the satisfaction of a Criminal Court Judge ruling on a facial sufficiency motion, that possibility does not render Respondent’s decision to issue the summons legally infirm.

Based upon the foregoing, I find Respondent Not Guilty.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

NOV 10 2021
DERMOT SHEA
POLICE COMMISSIONER

⁴ I take judicial notice that “Pilsner” is a type of pale lager beer.